IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 414 OF 1995.

1. Krishna Ramchandra Jadhav @ Yadav,]
2. Rajesh K. Jadhav @ Yadav,]
3. Sachin K. Jadhav @ Yadav,]
4. Bharat K. Jadhav @ Yadav,]
residing at Room No.11, S.B. Ajimal]
Chawl No.1, Kurar Village, Malad] .. Petitioners
(E), Bombay-400 097.] (Ori. Defdts.)

Versus

Smt. Shankari B. Ajimal,]
Room No. 12, Chawl No.2, S.B. Ajimal]
Chawl, Daftary Road, Kurar Village,] .. Respondent
Malad (East), Bombay - 400 097.] (Ori. Pltff.)

Mr. M.P. Bhavsar for the petitioners.

Mr. Harbhajan Singh C.A. of respondent in person.

CORAM: ANOOP V. MOHTA, J.

DATED: 26TH JULY, 2005

ORAL JUDGMENT. :

1. The petitioners are the legal representatives of the original tenant Smt, Vatsala Krishna Jadhav. The respondent is the landlady. The premises consist of one room situated at Kurar Village, Daftary Road, Malad (East), Mumbai. The original tenant Smt. Vatsala Jadhav died during the pendency of the suit and,

therefore, the petitioners-heirs are brought on the record. The suit filed by the landlady on the ground of non-payment of arrears of rent, and unauthorised permanent alteration, was dismissed by the The Court of Small Causes at Bombay (for short "Trial Court"). The Appellate Court, however, allowed the same and decree for possession has been granted in favour of the respondent-landlady against the petitioners-tenant. Therefore, the present Writ Petition by the petitioners.

2. The petitioners failed to deposit the rent regularly and were in arrears since 1st October, 1975. After due notice, the respondent-landlady filed the suit in the Trial Court. After considering the evidence led by the parties, the Trial Court held that the petitioner-tenant was a willful defaulter, but dismissed the suit by holding that there was no valid notice under Section 12(2) of the Bombay Rents Hotel and Boarding House Rates (Control) Act, 1987 (for short "The Bombay Rent Act").

3. All other grounds were also dismissed. In the present case, the landlady-respondent had adopted three modes of services to serve the legal notice. Firstly, the notice dated 1st April, 1976, was sent by registered post acknowledgement due (RP/AD); secondly, the notice

was sent Under Certificate of Posting (UCP) and thirdly, one copy of the notice was pasted on the outer door of the suit premises on 2/5/1976. As per the evidence of the respondent-landlady DW1, the registered notice was sent to the petitioner on a given address which returned with postal remarks "Unclaimed". There is an additional remark stating "Intimation" and there was a third postal remark "Not claimed" dated 3rd April, 1976. The said packet was returned with unsigned acknowledgement which shows that the said packet was not received by the defendant-petitioner.

4. So far as the packet which was sent by UCP, had not returned back. The service by pasting on the outer door of the premises was supported by DW1. Admittedly, no Postman was examined in this matter. The Trial Court, therefore, rejected the suit of the landlady for want of service of valid demand notice.

5. The Appellate Court in the Appeal, based on the same material and evidence on the record, quashed and set aside the said order passed by the Trial Court and decreed the suit, as prayed, basically by holding that there was a valid termination of tenancy by the said notice as the packet had returned with the endorsements "unclaimed", "intimation" and "not claimed"

The same supports the case of the landlady in view of the basic presumption as available under Section 27 of the Bombay General Clauses Act read with Section 114 of the Evidence Act. The unreturned packet of UCP of the same demand notice on the same correct address also supports the landlady's case based on the presumption of law in such circumstances. The finding of the Appellate Court, as referred below, supports the respondent-landlady's case.

> "He admits in his cross-examination that the addresses shows on the documents, Ex.A colly., i.e. to say notice, postal receipt and R.P.A.D. and envelope are correct. He has stated that the original Defendant did not tell him in respect of unclaiming of registered packet. He does not know whether the original Defendant had received the copy notice sent under certificate of posting."
>
> "Apart from this, the R.P.A.D., part of Ex.A colly. shows that the same was sent by R.P.A.D. on 1-4-1976. Postal endorsement on R.P.A.D., part of Ex. A colly. shows that it was not claimed by the addressee and it was sent back to the sender. From the registered packet, part of Ex. A colly., it is clear that on three occasions, the postman went to the suit premises when the Defendant was not found, and an intimation thereof appears to have been given to the Defendant by the concerned postman and on 28-4-1976 the original Defendant appears to have not claimed the registered packet and as such it was directed to be sent back to the sender."

6. The above reasoning has further support of the

evidence led by the parties. PW1 in the present case and as referred above and observed by the Appellate Court proved the issuance of notice and the return of the envelope with the endorsements as referred above. Nothing could be extracted in favour of the petitioner-tenant in the cross-examination. The basic averments remained intact. PW2 also supports the landlady on this material aspects.

7. The petitioner could not examine the original tenant in whose name notices were sent. The husband - petitioner No.1, except bare denial of non receipt of the notice, not supported any other material to justify their case of non receipt of all the notices and/or intimation. Therefore, the presumption, as available to the respondent-landlady in the facts and circumstances of the case, remained unrebutted.

8. Mr. M.P. Bhavsar appeared for the petitioner relied on **Vinod Shashank Chakor Pvt. Ltd. Vs. H.D. Merchant & Anr.** 2005 (1), RCJ, 332 and submitted that in the present case, as Postman was not examined and as there was denial of receipt of such notice by the petitioner-tenant, that itself was sufficient to consider the submission about the validity of the notice. Therefore, as demand notice was not served, the

suit for possession on the ground of non-payment of the rent was not maintainable. He further submitted that the presumption in such cases is rebuttable by positive statement and that initial presumption of service stood rebutted. In the present case, there was a feeble dispute raised about the endorsement on the acknowledgement and on the packet. The packet was received but it was contested that it was not received by the tenant, but by someone else. On that foundation and the surrounding circumstances, the correct findings were arrived at by the Trial Court and it was held that the suit for possession on the ground of default was not maintainable. In the present case, admittedly the respondent-landlady had adopted three modes of services as referred above and as observed by the Appellate Court. Therefore, the facts of the above case are distinct and distinguishable.

9. Countering this, Mr. Harbhajan Singh, the Constituted Attorney (C.A.) of the respondent appeared in person and has relied on AIR 1989, S.C., 630 **M/s. Madan & Co. Vs. Wazir Jaivir Chand**; 2003 (3) ALL MR, 511 **Shri David K.N. Vs. Shri S.R. Chaubey** (**Chaturvedi**); 2003, Bom.R.C., 347 **Ashok Pandurang Kulkarni Vs. Parshuram Narhar Joshi**; 2003 Bm. R.C., 109 **Kantilal Ravji Mehta & Anr. Vs. Sayarabai**

Chhaganlal Kering and resisted the above contentions of the petitioner and supported the reasoning given by the Appellate Court.

10. In **David K.N.** (supra), the Bombay High Court has considered the case of presumption in case of registered letter returned to the sender with remarks "unclaimed". In the present case also, it is a case of "unclaimed" remark by the Postal Department. The following paragraph of the above judgment supports the case of the landlady, as well as, the reasoning given by the Appellate Court. The Apex Court in **M/s. Madon** (supra) observed:

> "Once it is proved that summons were sent by registered post to a correct and given address, the defendant 's own conduct becomes important..... The defendant did not appear and no evidence whatsoever, on his behalf, has been led to rebut the presumption in regard to service of summons sent to him under registered post with acknowledgement due..... He could have examined the postman, who would have been the material witness and whose evidence would have bearing for proper adjudication. He has failed to discharge the onus cast upon him by the statute."

11. The above extracted portion from the Apex Court's decision in **Basant Singh & Anr. Vs. Roman Catholic Mission** (2002) 7 S.C.C., 531, apart from the

observations of the Bombay High Court, as referred above, further endorses that the onus of examining the postman, in such cases, lies upon the addressee in order to rebut the presumption under Section 26 of the Bombay General Clauses Act. This has a foundation of the Apex Court decision in **Basant Singh** as referred above, where the Apex Court has reiterated that once it is proved that the summons were sent by registered post to a correct and given address, the addressee did not appear and no evidence whatsoever on his behalf has been led to rebut the presumption in regard to the service of summons sent to him under registered post acknowledgement due. He could have examined the postman who would have been the material witness and whose evidence would have a bearing on proper adjudication. The Apex Court has further endorsed that mere denial itself is not sufficient reason to rebut the presumption in such cases. It is difficult, therefore, to accept the submission of the petitioner that non-examination of the postman itself is a sufficient reason to support his case of denial of receipt of the notice. I am also of the view that mere denial is not sufficient, specially in the present case, where admittedly the landlady had adopted three modes of service.

12. It is difficult to accept that there was no

receipt of notices in question, specially in the facts and circumstances of the present case, where the petitioner-tenant has not placed any other contra material or surrounding circumstances to justify as to why and under what circumstances they were not in the premises at the relevant time or any such related material to support that all the notices were not received by them or any member of the family. There is no dispute in the present case that the premises in question is a residential premises.

13. The following observations are relevant from **Dravid K.N.** (supra):

> "The Apex Court has nowhere held that mere testimony on oath of denial of service would lead to conclusion that the presumption arising under Section 28 of the Bombay General Clauses Act regarding service of notice would stand rebutted."

The further observation in **David K.N.** (supra) supports the landlady's case in the present circumstances of the case:

> "It is further to be noted that postal endorsement is not of refusal to receive but to the effect that the letter was not claimed. In other words, there was

> presumption not only regarding service of the notice but also regarding intimation of a letter having been received in the post office addressed to the tenant and failure to collect the same by the tenant as he was found absent in the premises at the time when postman approaches the premises to deliver the same. The presumption regarding intimation would arise under section 114 of the Evidence Act, as it is observed by the Apex Court."

In the said judgment itself, reference has been made to **M/s. Madan** (supra) of which extract is already reproduced above.

14. The respondent-original plaintiff has pointed out the positive averments in the Plaint (paragraph-8). whereby, the which are reproduced as under:

> "4. Plaintiff ultimately by his advocate's letter dated 1-4-76 terminated the tenancy of the defendant and by the same letter, called upon him to pay the arrears of rent then due. However, the Defendant, failed and neglected to pay the arrears and also failed and neglected to handover and vacate the suit premises."

15. To the aforesaid there is no specific denial or reference in the Written Statement filed by the petitioner. Therefore, he relied on 1994 Mah. RCJ, 14 (SC) **Lohia Properties (P) Ltd. Tinsukia, Dibrugarh Assam Vs. Atmaram Kumar**. The Apex Court has observed,

after referring to the provisions of Order VIII, Rule 5 of the Code of Civil Procedure (for short "CPC") as under:

> "Non traverse would constitute an implied admission. In the facts of this case the findings of the trial court and that of the first appellate court could be upheld on this admission. "

This factor also supports the landlady's case that there was not even a denial to the positive averments made by the landlady insofar as the notice in question. There was no other material to dispose the said implied admission.

16. The learned counsel appearing for the petitioners has also relied on AIR 1918 Privy Council **Harihar Banerji & Ors. Vs. Ramshashi Roy & Ors.** in support of his submission in reference to Section 106 of the Transfer of Property Act. To this, the respondent-landlady contended that this case in fact supports the landlady's case about the issuance and construction of such notice. In the present case, in view of the above observations this case is also not helpful to the petitioners to support the case, specially in regard to the issue of presumption of "service" as referred above.

17. Once the notice is valid and duly received and inspite of the demand made by the landlady, as the tenant failed to deposit the rent within the period as stipulated under the Bombay Rent Act, the order of eviction should follow. The following cases support of the respondent's submission - **Ashok Kulkarni** (supra) and **Kantilal Mehta** (supra) in which the Bombay High Court, after considering the provisions of Section 12(3) of the Bombay Rent Act in regard to non-payment of rent inspite of demand notice held that the Court has no option but to decree the suit for possession.

18. Taking into account the reasoning given by the Appellate Court, as well as, the above observations, I am of the view that the judgment and order dated 14th October, 1994, passed by the Appellate Court is correct and it is within the framework of law, as well as, the record. There is no case made out by the petitioners to interfere with the finding given by the Appellate Court.

19. For the above reasons, the Writ Petition is dismissed. Rule is discharged. Interim stay stands vacated. No order as to costs.

20. At the request of the learned counsel for the

petitioners, six months' time is granted to vacate the premises subject to usual undertaking to be filed by the petitioners and all other members residing in the suit premises, within two weeks from today. Petitioners shall not create any third party interest in the premises in question. The petitioners may pay the rent directly to the respondent-landlady.

[ANOOP V. MOHTA, J.]

[srpasha@hc]